

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

Kenneth Sweeting,) CASE NO. 7:14CV00187
Plaintiff,)
v.)
Dr. Daniel Miller, et al.,) OPINION & ORDER
Defendants.)
By: Norman K. Moon
United States District Judge

Kenneth Sweeting, a Virginia inmate proceeding *pro se*, filed this action pursuant to 42 U.S.C. § 1983, claiming prison officials and medical staff ignored his food allergies in violation of the Eighth Amendment to the United States Constitution. This matter is now before me upon Plaintiff's motion for entry of default judgment, in which Plaintiff asks the Court to enter default judgment against Dr. Daniel Miller. For the reasons stated herein, I will deny Plaintiff's motion.

I.

Sweeting claims Dr. Daniel Miller has failed to defend in accordance with the Federal Rules of Civil Procedure and therefore asks this Court to enter default judgment against him. “Rule 55 of the Federal Rules of Civil Procedure authorizes the entry of a default judgment when a defendant fails ‘to plead or otherwise defend’ in accordance with the Rules.” *United States v. Moradi*, 673 F.2d 725, 727 (4th Cir. 1982). Here, however, there is no indication that Dr. Miller has failed to comply with the federal rules in defending against Plaintiff’s claims. A request for “waiver of service” was sent to Dr. Miller on December 24, 2014, and Dr. Miller agreed to waive service, thus obligating him to respond to Plaintiff’s complaint by February 24, 2015. Dr. Miller then moved for summary judgment on February 19, 2015. In moving for summary judgment within 60 days of December 24, 2014, Dr. Miller did not fail to “plead or otherwise defend” this

action as is required for the entry of default judgment under Rule 55. *See, e.g., Johnson v. Warner*, No. 7:05-cv-00219, 2009 WL 586730, at *4 (W.D. Va. March 6, 2009) (recognizing that the term “otherwise defend” includes “not only an answer, but also preliminary motions that indicate the party’s intention to defend . . . such as . . . motions for summary judgment”).

II.

In light of the foregoing, there is no basis for entering default against Dr. Miller and Plaintiff’s motions for default judgment (docket nos. 28 & 38) are therefore **DENIED**.

The Clerk of the Court is hereby directed to send a certified copy of this order to all counsel of record.

ENTER: This 6th day of August, 2015.



NORMAN K. MOON
UNITED STATES DISTRICT JUDGE